UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/900,060	07/06/2001	Travis J. Muhlestein	MSFT115921	7821

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EXAMINER
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ART UNIT	PAPER NUMBER
2193	

MAIL DATE	DELIVERY MODE
03/21/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

PTOL-90A (Rev. 10/06)

	Application No.	Applicant(s)
Advisory Action ***Before the Filing of an Appeal Brief***	09/900,060	MUHLESTEIN ET AL.
	Examiner	Art Unit	
	Tuan A. Vu	2193	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED <u>05 March 2007</u> FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

    a) ☐ The period for reply expires _____months from the mailing date of the final rejection.

    b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

    Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

<u>NOTICE OF APPEAL</u>

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

<u>AMENDMENTS</u>

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will <u>not</u> be entered because

    (a)☐ They raise new issues that would require further consideration and/or search (see NOTE below);

    (b)☐ They raise the issue of new matter (see NOTE below);

    (c)☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or

    (d)☐ They present additional claims without canceling a corresponding number of finally rejected claims.

    NOTE: *See Continuation Sheet.* (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): _____.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

    The status of the claim(s) is (or will be) as follows:

    Claim(s) allowed: _____.

    Claim(s) objected to: _____.

    Claim(s) rejected: *1 and 3-17*.

    Claim(s) withdrawn from consideration: _____.

<u>AFFIDAVIT OR OTHER EVIDENCE</u>

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will <u>not</u> be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will <u>not</u> be entered because the affidavit or other evidence failed to overcome <u>all</u> rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

<u>REQUEST FOR RECONSIDERATION/OTHER</u>

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:

_____

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____.

Continuation of 3. NOTE: The Applicants have submitted that it would not be obvious for anyone in Microsoft .NET to develop a platform independent environment and simply incorporate platform specific APIs into it; and in asserting this possibility, it is clear that the Office Action has used hindsight gleaned from the Invention more than from prior art. First, the term API is not mentioned in the claim nor is any enforced implementation of WMI calls --as an intermediate/bytecode form-- anywhere explicit from the claim; i.e. the claim is about executing an application in a managed code environment to request instrumentation data, with a runtime engine "configured to" (is any execution taking place yet?) execute application compiled in a intermediate form. Applicants appear to leap from what is claimed into the level that the runtime environment is now a API-exclusive application such that only bytecodes of the API is the crux of what is called managed code environment. Second, the rejection has interpreted the claim language as presented without having to deal with the nature of any API; and based on the Background, NET runtime engine was known to operate with intermediate language(IL) for execution of MS platform portable Java code. The argument about lack of reason to provide bytecode-API has to be held back in order to clearly double-check how the claim clearly teaches implementing API as bytecodes or IL. Third, the argument about hindsight seems to stem from the fact the the rejection has put weight to instrumentation-API being implemented as bytecodes, thus falling exactly into what inventors believe to be their invention; but as mentioned above, this is not the case. The Background being recited only addresses IL in light of MS .NET application runtime, obviating the need to regard any bytecodes to implement API; and this is believed to be set forth in the rejection, rendering thereby the hindsight argument largely misplaced; that is, the rejection does not use any part of the Disclosure to mention about API in bytecode because there is no need to from the claim language. The claims as rejected are not in condition for allowance, and to simplify issues of an Appeal Brief, the amendments will not be entered..

Patent Examiner, AV 2193

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